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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GLORIA DENISE GITTENS, Defendant and Appellant.	F072237 (Super. Ct. No. F07907272) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Hill, P.J., Poochigian, J. and Detjen, J.

Appellant Gloria Denise Gittens appeals from the partial denial of her petition for resentencing, filed pursuant to Proposition 47. Appellant contends she was eligible for resentencing on her various convictions for second degree burglary (Pen. Code, §§ 459, 460, subd. (b))[1] because she entered commercial establishments with the intent to commit both identity theft and theft of merchandise. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2008, appellant was charged by way of an information with 99 criminal counts, including charges for, among others, second degree burglary (§§ 459, 460, subd. (b)), identity theft (§ 530.5, subd. (a)), petty theft with priors (§ 666), and receiving stolen property (§ 496, subd. (a)). It was further alleged that appellant had suffered several prior convictions.

In July 2008, appellant pled guilty to all 99 counts and admitted to all priors and enhancements, including two prior strikes. In exchange, appellant received a 36-year lid on her sentence, with the court indicating it would set aside her two prior strikes for the purposes of sentencing. Due to certain legal issues unrelated to this appeal, the People later dismissed counts 81, 87, and 95 through 98.

Appellant was subsequently sentenced to an aggregate term of 36 years. A principal term of 10 years (six years plus four 1-year enhancements) was imposed for a first degree burglary charge, followed by a series of either eight- or 16-month consecutive sentences for several of the second degree burglary and identity theft charges. Several other charges, including all the petty theft charges, which carried two-year sentences were ordered to run concurrently.

With respect to the conduct underlying appellant's charges, appellant regularly stole from a substantial number of people. She used her victims' information, checks,

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[1] All statutory references are to the Penal Code.

and credit cards to purchase goods at various stores and obtain money from ATM machines.

Following enactment of Proposition 47, appellant petitioned to have her convictions reduced to misdemeanors. The petition consisted of a single-page request for review. The trial court held a hearing on appellant's petition, where appellant was represented by the public defender. The parties stipulated to the use of the prior probation report to determine the facts of appellant's offense and reviewed the 94 offenses involved.

The trial court found appellant was eligible for a reduction on counts 8, 34, 46 through 48, 50, 55, 56, 58 through 60, 75 through 80, 82 through 86, 88 through 94, and 99, all of which were petty theft or receiving stolen property charges that were previously set as concurrent sentences, resulting in no reduction of appellant's aggregate sentence. The remaining charges were found to be ineligible for various reasons. With respect to the second degree burglary charges which were denied resentencing,[2] the trial court relied on two orders from other trial court cases holding that entering a store with the intent to commit identity theft or theft by false pretenses would not qualify as shoplifting under Proposition 47, and that appellant held the burden of proof on eligibility. This appeal timely followed.

DISCUSSION

Appellant argues the trial court erred by failing to recognize that the newly enacted shoplifting statute at section 459.5 covers "larceny *in all its forms*." As such, appellant contends the trial court wrongly concluded that entering a store with the intent to fraudulently obtain property does not qualify as entering with the intent to commit

[2] These were counts 2 through 4, 24 through 33, 35, 38, 49, 51 through 54, 57, and 61 through 66.

larceny as that term is properly understood with respect to shoplifting under Proposition 47.

Standard of Review and Applicable Law

"In November 2014, California voters enacted Proposition 47, which 'created a new resentencing provision: section 1170.18. Under section 1170.18, a person "currently serving" a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." ' " (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

"Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor 'where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).' (§ 459.5, subd. (a).) '[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered "a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours," and whether "the value of the property that [was] taken or intended to be taken" exceeded $950. (§ 459.5.)' " (*Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 448.)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*).)

The court's review of the meaning of a voter initiative is de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1113-1114.) Factual findings of the trial court are

reviewed "for substantial evidence and the application of those facts to the statute de novo." (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960.) The record is viewed in the light most favorable to the trial court's ruling with a presumption that the order is correct. (*Ibid.*)

Appellant's Conduct Does Not Qualify as Larceny

This court recently analyzed the meaning of the shoplifting statute and found that larceny, as used in that statute, should be interpreted according to its common law definition. (*People v. Martin* (Dec. 12, 2016, F071654) ___ Cal.App.5th ___, ___ [2016 Cal.App. LEXIS 1077, *25].) As such, to demonstrate eligibility, appellant must point to facts showing an intent to commit a trespassory taking, among other elements. (*Ibid.*) As we detailed in *Martin*, intending to commit theft by false pretenses (e.g. – by attempting to fraudulently obtain title to goods) does not qualify as larceny under this definition. (*Id.* at pp. ___-___ [*id*. at pp. *25-*26].) The facts as presented in this appeal show appellant attempted to purchase goods through fraudulent transactions. This conduct fails to satisfy the common-law definition of larceny as there was no intent to commit a trespassory taking. On the record before us, appellant's second degree burglary convictions do not, therefore, qualify for resentencing.

Appellant further notes the record does not contain evidence regarding the value of the property at issue in each charge nor whether the various businesses entered were open at the time of appellant's crimes. Given that appellant's petition arose before substantial guidance had been given by the courts, there is a reasonable probability that appellant may not have understood the burden imposed upon her to demonstrate eligibility and thus may have been unprepared with respect to demonstrating one or more of her various convictions qualified as shoplifting. It is therefore proper to ensure appellant's petition is denied without prejudice to consideration of a subsequent petition which demonstrates appellant's eligibility. (See *Johnson*, *supra*, 1 Cal.App.5th at pp. 970-971.)

DISPOSITION

The order is affirmed without prejudice.